SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

JANUARY TERM, 1976

No. 75-1168

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

MELANIE LUECK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

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No.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
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v.

MELANIE LUECK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Southern Pacific Transportation Company, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered in this proceeding on November 18, 1975.

OPINION BELOW

The opinion of the Arizona Court of Appeals is reported at 22 Ariz. App. 90, 523 P.2d 1327 (1971). The opinion of the Supreme Court of Arizona, vacating the court of appeals opinion, is reported at 111

Ariz. 560, 535 P.2d 599 (1975). The supplemental opinion of the Arizona Supreme Court is unreported.

JURISDICTION

The Supreme Court of Arizona, in its first decision, determined all issues before it except petitioner's motion for new trial, which was remanded to the trial court for an evidentiary hearing on issues regarding respondent's production of an expert witness who committed perjury at trial. A timely motion for rehearing, addressed to all issues decided by the court in its first opinion, was denied on June 3, 1975 and the memorandum in support of the motion was stricken from the record.

The mandated hearing was held on June 26, 1975 and the trial court decision rendered on August 8, 1975. Pursuant to procedures established by the Arizona Supreme Court, petitioner timely filed its objections to the findings of the trial court.

The Supreme Court of Arizona, after oral arguments were requested and denied, issued a supplemental opinion on October 7, 1975. A timely motion for rehearing was denied on November 18, 1975, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Arizona's refusal to consider or review the record of a trial court proceeding, held pursuant to its own mandate and

directed to essential issues in controversy, denied petitioner its constitutional right to a meaningful appeal and due process of law?

2. Whether the Supreme Court of Arizona denied petitioner procedural due process by refusing it the right to argue its position orally at any stage subsequent to the decision rendered in its favor by the Arizona Court of Appeals and by striking the only brief on the merits filed by petitioner with the Supreme Court?

3. Whether the Supreme Court of Arizona's classification of petitioner according to its wealth, measured in terms of legal staff, police officers and investigators available to it, for the purpose of ascertaining whether due diligence was exercised in discovering that the respondent's reconstruction expert was an impostor, and failure to allow the taking of relevant depositions denied petitioner of equal protection and due process of law?

4. Whether petitioner was denied substantive due process by the Supreme Court of Arizona's decision that the burden of discovering that an expert witness is an impostor rests on the adverse party and that a jury verdict premised on perjured testimony is not inherently of such character to give reasonable assurance that upon retrial a different result would ensue?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This wrongful death action was instituted by the widow of William T. Lueck for his death which occurred when the motor vehicle he was driving collided with petitioner's train.

The respondent presented a reconstruction expert, Mr. Allen W. Dickinson.[1] The witness testified that: he held both B.A. and M.A. degrees from Cambridge University, Cambridge, England as well as a fellowship in dynamics; he was a member of the Comet Investigation Committee; he had published an article with the English Government entitled "Fatigue Failure on the Comet Airplane"; he was a member of the VonBraun aerospace team; he was employed by Mitchell Engineering; and, he was employed by Harvey Aluminum. Mr. Dickinson, the sole accident reconstruction expert presented by respondent, testified that the Southern Pacific train, according to his calculations, was traveling at speeds up to 70 m.p.h. at the time of the collision; this is 10 m.p.h. in excess of the lawful maximum speed set by the city of Willcox.

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[1] Although this controversy had been pending for six years, the expert witness was produced by the respondent only six weeks before trial.

The jury returned a verdict in favor of respondent amounting to $3,080,000; $2,000,000 compensatory damages and $1,080,000 punitive damages.[2]

On appeal, the Arizona State Court of Appeals reversed the trial court and remanded for a new trial. The intermediate court held that an instruction on gross or wilful and wanton negligence was unsupported by the evidence and erroneously given.

Respondent, on October 8, 1974, filed a petition for review and requested

> "pursuant to Supreme Court Rules 4, 6 and 25, oral argument on the above entitled matter."

This request was denied.

While this controversy was pending before the Supreme Court of Arizona, the petitioner discovered that the respondent's reconstruction expert, Allen W. Dickinson, was an impostor. The perjurer had not received degrees from Cambridge University and, at trial, had perjured himself as to his qualifications, past employments, and professional associations. This was immediately brought to the attention of counsel for respondent and subsequently, a request to supplement the record on appeal was filed with the Arizona Supreme Court.

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[2] This award was predicated upon evidence which reflected the following net income of the decedent:

1961	1,676.87
1962	4,417.57
1963	5,834.37
1964	1,121.61
1965	(12,347.38) loss
1966	(489.95) loss

The Supreme Court of Arizona, reversed the appellate court decision, and affirmed the judgment of the trial court. It reserved ruling on petitioner's motion for new trial, which was based upon the discovery of the expert's perjured testimony, and ordered the trial court to hold a hearing to determine

> "pursuant to Rule 60(c), whether the asserted newly discovered evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(d), 16 A.R.S., and whether it is of such a character as to give reasonable assurance that it will work a different result upon retrial." *So. Pac. Transp. Co.* v. *Lueck,* 111 Ariz. 560, 577, 535 P.2d 599, 615-16.

On June 26, 1975 the trial court held the mandated hearing. Three witnesses were sworn and one hundred pages of testimony recorded. The trial court, in its "Report and Decision", stated that

> "the railroad company had numerous special agents, police officers and a large legal staff in its employ for the purpose of investigating the facts of all cases, and had unusual facilities for discovering the truth and the real facts and for preparing cases for trial."

Based upon this finding, the trial court concluded that due diligence was not exercised. Prior to the hearing and in an effort to demonstrate its exercise of due diligence, petitioner attempted to depose the expert impostor and the party who supplied the false witness to respondent's counsel; the trial court prohibited petitioner from taking those depositions.

Petitioner then filed its "Objection to Finding, Judgment and Determination of Trial Court" pursuant to the special procedure established by the Arizona

Supreme Court. 111 Ariz. at 577, 535 P.2d at 616. Petitioner contended:

1) that any determination of due diligence which included considerations such as the size and wealth of the party denied it of its constitutional right to due process and equal protection;

2) that the court could not properly rule on the question of due diligence until the deposition of respondent's impostor and that of his supplier were taken; and,

3) that shifting the burden of assuring a witness's authenticity from the party presenting the witness to the adverse party, "denied this petitioner's constitutional right to due process...." (Objection to Finding, Judgment and Determination of Trial Court, p. 10.)

Simultaneously, the petitioner filed a motion with the Supreme Court of Arizona requesting that the transcript of the June 26, 1975 hearing be designated as part of the record and that a time be set for oral arguments.[3] The petitioner stated the constitutional deprivation which it would sustain if the court failed to review the original transcript of the hearing as follows:

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[3] The motion requested an order:

"1) Granting and setting a time for oral argument in this matter;

2) Granting the appellant the right to file a Reply Memorendum to the Response of the appellee to the Objections filed herewith to the Trial Court's Findings, Judgment and Determination dated August 8, 1975.

3) Designating as part of the record in this matter the Transcript of the hearing held on June 26, 1975."

> "that any determination of this case without a thorough review of the Transcript of June 26, 1975 hearing would constitute a violation of the [petitioner's] rights.
>
> * * * *
>
> Due process under the Federal and State Constitutions requires . . . that the necessary record be completed so that the Court will have a complete record before it prior to making its determination." (Motion, p. 2.)

The Supreme Court of Arizona denied both petitioner's motion for oral argument and request to file a supplemental memorandum. The Supreme Court of Arizona failed to rule on petitioner's motion to supplement the record; in fact, the court failed to designate the transcript of the June 26, 1975 hearing as part of the record.[4] Thus, the court failed to review the testimony of the hearing held pursuant to its own order, prior to rendering its supplemental decision of October 7, 1975.

In the supplemental opinion, the Supreme Court of Arizona affirmed the trial court's determination without reference to the constitutional objections raised.

The petitioner, in its second motion for rehearing, once again clearly placed the following constitutional issues before the court:

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[4] The failure of the Arizona Supreme Court to review this Transcript is conclusively established by the letters from the Clerk of the Trial Court having possession of said Transcript. Appendix. (These letters were attached to the second motion for rehearing filed with the Arizona Supreme Court.)

1. the petitioner contended that

> "[it] was deprived of its constitutional right to equal protection and due process of law because the Supplemental Opinion promulgates the doctrines a) that a party having a large investigation staff is held to a higher standard of due diligence and b) that the burden of determining the authenticity of the credentials of an expert witness rests solely on the adverse party, rather than the party tendering the witness." (Motion for Rehearing, p. 3.);

2. the court's failure to review the record of the mandated hearing prior to issuing its opinion effectively denied petitioner of procedural due process. Specifically, the court was requested

> "[t]o rehear and reconsider its decision, as set forth in its Supplemental Opinion which affirmed the judgment of the trial court as set forth in its Report and Decision, on the grounds that the record of the June 26, 1975, hearing was not before this court, and therefore, this court could not determine whether the trial court's decision was supported by the record; consequently, appellant was denied its constitutional right of procedural due process." (Motion for Rehearing, p. 10.); and, the petitioner contended that

3. "[shifting] the burden of determining the authenticity of the credentials of an expert witness rests solely on the adverse party, rather than the party tendering the witness denied petitioner of due process of law." (Motion for Rehearing, p. 23.).

Petitioner once again requested oral argument; this motion was denied. The Supreme Court of Arizona also denied petitioner's motion for rehearing on No-

vember 18, 1975 without addressing the constitutional issues repeatedly placed before it by this petitioner.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Has Promulgated the Doctrine, Heretofore Foreign to the Common Law of the United States, That an Appellate Court Need Not Review the Record Prior to Rendering Its Decision.

The requirement of due process of law is not confined to proceedings in the trial court but includes proceedings on appeal in state court. *U.S.* v. *Mills,* 21 F. Supp. 616 (E.D. Penn. 1937).

This controversy was remanded to the trial court to determine whether the petitioner exercised due diligence in discovering that respondent's sole reconstruction expert was a perjurer; a transcript of those proceedings was made.

The petitioner, on proper motion, requested that the transcript be designated part of the record in order that the Supreme Court of Arizona could review the entire record prior to rendering a decision. The court refused to rule upon this request and based its decision on the trial court's "Report and Decision" rather than reviewing the transcript of proceedings.

The law of Arizona is clear that a memorandum opinion of the trial court is not a part of the record on appeal. *Robinson* v. *Herring,* 75 Ariz. 166, 253 P.2d 347 (1953). In disregard of this basic maxim, the Supreme Court of Arizona refused to designate the original transcript part of the record and failed to review the evidence prior to rendering its decision.

The adversary appellate system is predicated upon an appellant's opportunity to persuade a reviewing

court that the legal conclusions of a trial court are erroneous; the starting point of such contentions is the transcript of the proceeding. *Gardner* v. *California,* 393 U.S. 367 (1969). Without the benefit of a transcript, a reviewing court cannot determine whether the lower court's conclusions are supported by the record.

It is elementary that a court which renders a decision prior to receiving all the evidence deprives the litigant of property without due process of law. *Rosenberg* v. *Baum,* 153 F.2d 10 (10th Cir. 1946). The Supreme Court of Arizona's failure to review the transcript of proceedings, which it had ordered, reduced the proceedings to a most perfunctory level. Not only does this petitioner possess the constitutional right to be heard, but that proceeding must be meaningful. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

The Supreme Court of Arizona's affirmation of the trial court's findings without meaningful review of the underlying evidence is in blatant disregard of this petitioner's constitutional right to due process of law; approval or assent by the Supreme Court of the United States to such procedures would be destructive to the integrity of the adversary system.

2. The Supreme Court of Arizona's Refusal to Hear Oral Arguments, Once Properly Requested, and Striking Petitioner's Only Brief on the Merits Filed with the Court Denied Petitioner of Procedural Due Process.

After the court of appeals reversed the trial court judgment against petitioner for $3,080,000.00, the respondent, pursuant to Rule 4, 6, and 25 of the Rules of the Supreme Court, filed a Petition for Review and requested oral argument.

Petitioner relied on that request; however, oral argument was not allowed. Rule 6 provides:

> "After the service and filing of briefs as authorized by these Rules, either party, upon timely request as provided by Rule 25, *will be heard orally*. The appellant will be heard for not more than fifty minutes and the appellee for not more than forty minutes, unless for special reason additional time is granted by the court. Counsel appearing as amici curiae shall not be heard except when permitted by the court and then for such time only as the court prescribes." (Emphasis Added.)

Despite the request being made pursuant to Rule 25 and the mandatory language of the Rule, oral argument was not allowed.

Without the benefit of oral argument or briefs, except those filed below, the Supreme Court granted review and rendered its decision cited *supra*.

Petitioner then filed its first motion for rehearing again requesting oral argument. This request was denied. The request was renewed in a motion filed simultaneous with petitioner's Objections to Findings, Judgment and Determination of Trial Court. This request was also denied. Oral argument was requested by petitioner, for a third time, on its second motion for rehearing. This request, as the others, was denied.

Charles C. Bernstein, a former Chief Justice of the Arizona Supreme Court stated that:

> "Oral argument is an excellent opportunity for an attorney to bring his case to the undivided attention of the Court. It is a time when both he and the Court can assure themselves that the issues of the case are thoroughly understood by

> the Court . . . . As a general or perhaps universal rule, counsel should not submit a case for decision without oral argument, and deprive himself of this opportunity to state his position before the Court." Bernstein, *The Disposition of Civil Appeals in the Supreme Court,* 5 Ariz. L. Rev. 174, 187 (1964).

Petitioner was consistently denied its right to oral argument in spite of the unequivocal language of the Supreme Court Rules; that refusal precluded petitioner from exercising its constitutional right to present its position to the court.

Once the Supreme Court of Arizona reversed the court of appeals petitioner filed, pursuant to Rule 47(a), Rules of the Supreme Court, a timely motion for rehearing; this motion was stricken from the record as "disrespectful and abusive."[5] At this point in the proceedings then, petitioner had not been afforded the right to present its position orally, and the only legal brief it submitted had not been considered, but was stricken.

These procedural defects, which were thrust upon petitioner, interfered with the exercise of constitutionally protected rights. When these defects are combined with the Supreme Court of Arizona's failure to review the original transcript of a proceeding held pursuant to its own order it is plain that petitioner was subjected to a meaningless appellate process. This

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[5] Petitioner admits that its memorandum was candid and forceful; denies that it was either disrespectful or abusive, and is of the opinion that if the submitted memorandum had been objectively considered, a rehearing would have been granted.

is contrary to the mandate of the United States Supreme Court that an appeal, once provided, must be meaningful. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

3. The Laws of the United States and the State of Arizona Are Contrary to the Arizona Supreme Court's Conclusion That the Size, Wealth, and Available Staff of the Petitioner Are Proper Considerations in Determining Whether It Exercised Due Diligence in Presenting the Newly Discovered Evidence Which Proved That Respondent Presented an Imposter at Trial; Moreover, Failure to Allow the Taking of Relevant Depositions Precluded Petitioner From Demonstrating Its Exercise of Due Diligence.

Wealth discrimination is not a fundamental right which requires a showing of a compelling state interest to sustain the classification. *San Antonio School Dist.* v. *Rodriquez,* 411 U.S. 1 (1973). To sustain distinctions based upon wealth, however, a reasonable basis for the classification must exist and it must not be arbitrary in nature. *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *Walters* v. *St. Louis,* 347 U.S. 231 (1954).

Corporations are persons within the ambit of protection of the equal protection and due process clauses. *Safeguard Mutual Ins. Co.* v. *Miller,* 472 F.2d 732 (3rd Cir. 1973). Consequently, any distinctions between the burdens placed on individuals and those on corporations, as it regards the exercise of due diligence in revealing newly discovered evidence, must have a reasonable and rational basis for its promulgation.

Petitioner is unable to discover authority to support the classification promulgated by the Supreme Court of Arizona. Moreover, neither the record of the trial court nor the opinion of the Supreme Court of Arizona states the basis for its conclusion that the

number of special agents, police officers and legal staff available to it is rationally related to the question of petitioner's exercise of due diligence.

Petitioner attempted to take the depositions of respondent's perjurer and the person producing him so that the court would have all the available evidence before it prior to determining the issue of due diligence.

The court prevented the taking of those depositions which would have demonstrated the impostor's extraordinary skill at deception. It thereby precluded consideration of evidence relevant to the issue of due diligence. This judicial prohibition severely curtailed petitioner's constitutional rights.

Any classification violative of the equal protection clause of the Constitution also violates the due process clause. *Johnson* v. *Robinson,* 415 U.S. 361 (1974). The classification which has been drawn here is arbitrary and lacks a valid state objective the absence of which violates this petitioner's constitutionally protected rights. *Turner* v. *Fouche,* 396 U.S. 346 (1970). The court's refusal to allow discovery relevant to the issue before it, produced an intolerable result.

4. Sustaining a Jury Verdict Predicated Upon Perjured Testimony Perverts the Jury System and Effectively Thrusts the Burden of Discovering the Authenticity of a Witness Upon the Adverse Party Thereby Depriving the Adverse Party of His Right to Jury Trial and Due Process of Law.

The Supreme Court of Arizona, in its supplemental opinion, affirmed the trial court's determination that the presence of perjured testimony was not of such

character that, upon retrial without the perjured testimony, a different result would occur.

The imperative question of upholding a jury verdict, which is premised to an unknown degree upon perjured testimony, was blandly disregarded by the trial court as evidenced by its statement that:

> "[c]asting aside the witness's testimony concerning his educational background and experience, his testimony was merely that of a typical accident reconstruction expert." (Report and Decision, p. 4.)

Arizona constitutionally provides for trial by jury in civil cases. Ariz. Const. Art. 2 § 23. The Supreme Court of Arizona's determination that perjured testimony, presented to and considered by the jury, is not basis for reasonably believing that a new result would occur upon retrial contravenes petitioner's right to a jury trial. Moreover, effectively shifting the burden of determining an expert's authenticity, from the party presenting him, to the adverse party is destructive of the adversary system and denies an opponent due process of law.

There are relatively few reported incidents of expert witnesses perjuring their testimony. *See* 38 A.L.R. 3rd 812. The majority of courts considering the question, in the context of a motion for new trial, and more specifically in determining whether a different result would occur upon retrial, have held that the jury verdict, albeit founded on perjured testimony, can be upheld. *See, e.g., Barton* v. *Plaisted,* 109 N.H. 428, 256 A.2d 642 (1969); *Freeman* v. *Jergins,* 125 Cal.App.2d 536, 271 P.2d 210 (1954). *But*

cf., Donati v. *Gualdoni,* 358 Mo. 667, 216 S.W.2d 519 (1949).

These decisions completely disregard the function of a jury in a civil case. The cornerstone of the jury system is the submission of disputed facts to the jury for final arbitration. *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U.S. 494 (1931). Traditionally, jurors are instructed, as they were here, that they are the sole judges of the credibility of witnesses and their truthfulness; indeed, the jurors are to determine the weight to be given to the testimony of any witness. *Batt* v. *State,* 28 Utah 2d 417, 503 P.2d 855 (1972). Jurors are bound to follow these instructions in rendering a verdict.

State courts have concluded that although a jury verdict is predicated upon perjured testimony, an esoteric determination can be made, by the judge as a thirteenth juror, that the perjured testimony was not relevant to the jury verdict; this conclusion patently violates a party's constitutional right to jury trial. The function of the jury is arbitrarily reduced to meaningless conduct.

The perjured expert witness must be perceived as the agent of the party presenting him. *Barton* v. *Plaisted,* 109 N.H. 428, 256 A.2d 642 (1969) (dissenting opinion). If he is not, then, the burden of vouching for the authenticity of a witness is shifted to the adverse party. Once this onus is transferred, the adversary system becomes suspect and the adverse party is denied due process.

Permitting a jury verdict to stand, although predicated upon perjured testimony, is wrong. There is no empirical method of calculating the effect of an in-

dividual witness's testimony on a jury verdict. This maxim is substantiated by the presumption that prejudice exists when improper evidence is admitted upon which the jury might act. *Mexia* v. *Oliver,* 148 U.S. 664 (1893). Furthermore, it must be assumed that the jury was influenced to the fullest extent by any evidence improperly admitted. *Valley Transp. System* v. *Reinartz,* 67 Ariz. 380, 197 P.2d 269 (1948); *Harris* v. *Thompson,* 18 Ariz. App. 154, 500 P.2d 1142 (1972).

In the instant case, an expert witness claimed the most respectable of professional pedigrees. His testimony, delivered in a beautifully cultured English accent, was directed to crucial issues in the controversy on which he was the only expert witness. Certainly, it cannot be contended with intellectual integrity that this perjurer's testimony had no affect upon the ultimate verdict.

The position of petitioner is succinctly stated by Justice Grimes of the New Hampshire Supreme Court in his dissenting opinion in *Barton* v. *Plaisted, supra,*

> "We are dealing here not only with what effect newly discovered evidence would have at a new trial but with the fact that the jury was permitted to hear and consider testimony from two hired witnesses on a 'significant issue' which has now been found to have been fraudulent.
>
> * * * *
>
> A rule which requires the Presiding Justice to forecast the workings of the minds of twelve suppositious jurymen can hardly be regarded as sensible."
>
> 256 A.2d at 649.
>
> Petitioner vigorously contends that "[p]lacing a burden upon a party prior to trial to discover

> the integrity of each witness presented by the adverse party, perverts the adversary system. Moreover, when this burden is either increased or decreased depending on the size and investigatory staff available to a party, it is tantamount to a denial of a party's constitutional right to due process and equal protection of law."
>
> (Objection to Finding, Judgment and Determination of Trial Court, p. 10.)

This same contention was properly placed before the Supreme Court of Arizona, which rather than address the issue, chose to ignore it.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arizona.

Respectfully submitted,

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